

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2006-CA-00017-COA

RON PARMLEY D/B/A A CLASSIC WRECKER

APPELLANT

v.

**WOODROW W. PRINGLE, III, BEN F. GALLOWAY
AND OWEN AND GALLOWAY, PLLC**

APPELLEES

DATE OF JUDGMENT:	11/7/2005
TRIAL JUDGE:	HON. JERRY O. TERRY, SR.
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	MICHAEL G. PIAZZA
ATTORNEY FOR APPELLEES:	WOODROW W. PRINGLE
NATURE OF THE CASE:	CIVIL - LEGAL MALPRACTICE
TRIAL COURT DISPOSITION:	DEFENDANTS' MOTION TO DISMISS GRANTED.
DISPOSITION:	REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION - 07/31/2007
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE LEE, P.J., IRVING AND CHANDLER, JJ.

LEE, P.J., FOR THE COURT:

FACTS AND PROCEDURAL HISTORY

¶1. On October 4, 1999, Woodrow Pringle, III, Ben F. Galloway, and Owen & Galloway, PLLC, (collectively “Pringle”) filed a complaint on Ron Parmley’s behalf asserting various breach of contract claims. Over the course of their representation, Parmley alleged that Pringle failed to assert certain causes of action and that Pringle settled claims with all but one defendant without his consent.¹ Aggrieved, Parmley, d/b/a A Classic Wrecker, filed a complaint on January 31, 2005,

¹Pringle asserts that Parmley gave his attorneys permission to settle with the various defendants, but later changed his mind and refused to execute the settlement documents and that this

against Pringle, Galloway, and Owen & Galloway in the Circuit Court of the First Judicial District of Harrison County asserting legal malpractice. Parmley, represented by Michael Hill, incorrectly served process on Pringle, an in-state defendant, by certified mail in violation of Mississippi Rule of Civil Procedure 4(d)(4). Parmley failed to properly serve process within 120 days of filing the complaint. Thereafter, Parmley filed another complaint on June 7, 2005, asserting the same causes of action. Summons was properly served within 120 days.

¶2. On July 5, 2005, Pringle filed a motion to dismiss the complaints for failure to serve process and for failure to file the second complaint within the three-year statute of limitations. The circuit court granted Pringle's motions to dismiss both complaints. The first complaint was dismissed for failure to serve process within 120 days as required by Mississippi Rule of Civil Procedure 4. The second complaint was dismissed for failure to file before the expiration of the applicable statute of limitations. Parmley now appeals to this Court asserting the following issue: the circuit court erred in granting Pringle's motion to dismiss the June 7, 2005 complaint.

¶3. Finding that the trial court erred in dismissing the complaint, we reverse.

STANDARD OF REVIEW

¶4. The lower court's grant of a motion to dismiss based upon the statute of limitations presents a question of law to which this Court applies de novo review. *Anderson v. R & D Foods, Inc.*, 913 So. 2d 394, 397 (¶7) (Miss. Ct. App. 2005).

DISCUSSION

¶5. Parmley's main argument is that the complaint filed on June 7, 2005, was filed prior to the running of the statute of limitations and should not have been dismissed. Parmley also argues that,

was their basis for withdrawing as counsel. This is not, however, an issue on appeal.

while the trial court properly dismissed the original complaint, the trial court incorrectly dismissed the complaint “with prejudice.”

¶6. The statute of limitations on legal malpractice actions is three years. Miss. Code Ann. § 15-1-49 (Rev. 2003). The statute of limitations begins to run on the date the client learns, or through the exercise of reasonable diligence, should have learned of the negligence of his lawyer. *Smith v. Sneed*, 638 So. 2d 1252, 1253 (Miss. 1994). The parties seem to agree that the statute of limitations began to run on May 16, 2002, the day the circuit court enforced the settlement order concerning certain defendants in the lawsuit handled by Pringle. Thus, the statute of limitations expired on May 16, 2005.

¶7. Altering the three-year statute of limitations in this case, however, is the complaint filed on January 31, 2005, for which no process was served. The filing of a complaint even without service of process tolls the three-year statute of limitations for the 120-day period allowed in M.R.C.P. 4(h). *Owens v. Mai*, 891 So. 2d 220, 223 (¶16) (Miss. 2005). We must follow the analysis of the supreme court in applying the tolling period in Rule 4(h). Regarding the tolling period to serve process in relation to the calculation of the statute of limitations, the following application was set forth by the supreme court in *Triple “C” Transp., Inc. v. Dickens*, 870 So. 2d 1195, 1199-1200 (¶¶34-35) (Miss. 2004):

Here, the accident occurred on October 6, 1994. Dickens filed suit on July 14, 1997, 84 days before the expiration of the three years. Dickens did not attempt process on Henry during the 120 days, which ended November 11, 1997. Since process was not served on Henry as of that date, the statute of limitations began to run again, and it expired 84 days later, on February 3, 1998.

Id.

¶8. In the case sub judice, the statute of limitations began to run on May 16, 2002. The complaint was filed on January 31, 2005, 105 days before the expiration of the three years. The 120

day tolling period passed without process being correctly served. Since Parmley filed a complaint but failed to properly serve process within 120 days, the running of the statute of limitations resumed at the end of the 120 day tolling period. *Id.*; *Fortenberry v. Mem'l Hosp. at Gulfport, Inc.*, 676 So. 2d 252, 254 (Miss. 1996). Therefore, the filing of the first complaint stopped the statute of limitations from running for 120 days, which ended May 31, 2005. Since process was not served as of that date, the statute of limitations began to run again and expired 105 days later on September 13, 2005. Thus, the complaint filed on June 7, 2005, was filed within the statute of limitations. Pursuant to the precedent set forth for this Court to follow regarding the tolling period in Rule 4(h), we find that the trial court erred in dismissing the complaint.

¶9. After performing a de novo review of the record, we find that the trial court erred in finding that the statute of limitations had run on Parmley's claim. We also find that the trial court erred in dismissing with prejudice the complaint filed on January 31, 2005. Failure to serve process within 120 days of the filing of a complaint, absent proof of "good cause," shall warrant dismissal upon the court's initiative or upon motion. M.R.C.P. 4(h); *Heard v. Remy*, 937 So. 2d 939, 941 (¶8) (Miss. 2006). However, Rule 4(h) dismissals should be made without prejudice, not with prejudice as the circuit court did here. *Watters v. Stripling*, 675 So. 2d 1242, 1243 (Miss. 1996). We find that the order dismissing the complaint filed on January 31, 2005, with prejudice was in error, and that the complaint filed on June 7, 2005, should be reinstated.

¶10. THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY, FIRST JUDICIAL DISTRICT, IS REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEES.

KING, C.J., MYERS, P.J., IRVING, CHANDLER, GRIFFIS, BARNES, ISHEE, ROBERTS AND CARLTON, JJ., CONCUR.